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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-426

ESTATE OF PHYLLIS ELLERTON McCORD,
DECEASED,
U. S. BRATTON, JR., EXECUTOR,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Estate of Phyllis Ellerton McCord, Deceased, U. S. Bratton, Jr., Executor, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled action on May 30, 1975.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Michigan, Southern Division, was not reported but is printed in the Appendix (p. 15).

The opinion of the United States Court of Appeals for the Sixth Circuit is reported in 516 F.2d 832 (1975), and is printed in the Appendix (p. 22).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered May 30, 1975, affirming in part the judgment of the United States District Court for the Eastern District of Michigan, Southern Division, entered October 22, 1974. The Court of Appeals denied a timely petition for rehearing on July 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

The Will of Phyllis Ellerton McCord (hereinafter "decedent") created a trust for the benefit of her mentally retarded daughter and for charity. By reason of ambiguities in its terms, the Will required judicial construction to determine whether or not decedent's estate is entitled to a charitable deduction for Federal estate tax purposes. Must a Federal court in such circumstances employ the principles of Will construction established under the laws of the State where the decedent was domiciled (in this case, Michigan)? If so, is granting of a summary judgment appropriate where decedent's intent is the controlling factor?

STATUTES INVOLVED

The Federal statutes involved are 26 U.S.C. Section 2055, the pertinent provisions of which are set forth in the opinion of the Court of Appeals (Appendix, p. 25, and 28 U.S.C. Section 1652, which states:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

A. The facts as stipulated by the parties are as follows:

1. Decedent died November 12, 1968 leaving a gross estate of $1,679,269.61. She was survived by her daughter who suffered from Mongolism since birth and was confined to a state institution in Michigan at her mother's death. The daughter's mental condition is such that she will be institutionalized for life.

2. In her Will decedent established a testamentary trust of the residue of her estate for her daughter's lifetime with the remainder to be distributed to designated charities qualifying for the Federal estate tax deduction under 26 U.S.C. Section 2055.

3. The provisions relating to distribution of income and principal are set forth in Article V of the Will as follows:

> "(a) It shall be the duty of my Trustees to pay such portion of the income derived from the trust

estate to my said daughter, or to her Guardian, as shall in their sole judgment be necessary or expedient to properly and adequately provide for the support, maintenance and welfare of my said daughter. Said income shall be payable quarterly or at more frequent intervals, if the accumulation of income is sufficient to warrant it, or if, in the sole judgment and discretion of my Trustees, more frequent distribution is required or justified by the needs of my beneficiary. If in any year said net income exceeds the amount necessary for the support and maintenance of my said daughter, then I direct that my Trustees, in their sole discretion, distribute such surplus income to such institution as my daughter may at that time reside, or to such other charitable or religious institutions as my Trustees in their sole judgment or discretion may determine. It is my primary objective or concern that my Trustees at all times make certain that such funds as are employed for the betterment of the condition under which my daughter is living, shall be directed especially toward improvements in the Unit or Village, so-called, in which my said daughter is at any such time living.

"(b) I further direct that my Trustees herein nominated shall in their sole judgment and discretion have the right at any time during the operation of the trust, to invade the principal and distribute therefrom should they at any time conclude that the trust income, together with the separate income which the beneficiary may have, is insufficient to afford said beneficiary with the necessaries of life in keeping with the standard to which she is accustomed; and I do authorize my said Trustee

to distribute the entire principal and income of said trust estate at any time prior to the time the trust would otherwise terminate in the manner hereinbefore set forth, if in their sole judgment and discretion, such earlier distribution is justified and warranted by the circumstances existing at the time of any such distribution of principal, it being my chief motive in establishing the within trust to attempt to guarantee the use and disposal of my trust estate at all times for the best interest of the beneficiary herein named."

4. On termination of the trust, the remainder passes under Article VI of the Will, providing in part as follows:

"Upon the termination of the trust herein created, or in the event my daughter, PHYLLIS ELLERTON McCORD II, predeceases me or shall die in the same calamity or event which shall cause my death, and subject to the payment of the bequests hereinbefore set forth in Article III, the corpus of the trust, together with accumulated income, if any, or the residue of my estate, as the case may be, shall be distributed to the TRUSTEES OF THE EPISCOPAL DIOCESE OF MICHIGAN for the purpose of establishing and maintaining a home for retarded children and retarded adults . . . "

5. From the date of decedent's death the total expenses for the care and maintenance of her daughter have constituted about 12% of the net aggregate income of the trust. The balance of the income has been distributed to various charities selected by the trustees.

6. On the Federal estate tax return petitioner claimed a charitable deduction for the actuarial value of the in-

terests passing to charity. The Internal Revenue Service disallowed such deduction in its entirety and assessed a deficiency in tax of $369,221.70, which petitioner paid with interest of $58,928.79. Petitioner timely filed a claim for refund and commenced action for recovery of taxes paid with the United States District Court, Eastern District, requesting trial by jury.

B. Prior to a trial on the merits in the District Court, respondent moved for summary judgment on the grounds that the Will did not provide "ascertainable standards" for the use of income and principal for the daughter's benefit as provided under Treasury Regulation Section 20. 2055-2 (26 C.F.R.). Petitioner contested respondent's motion on the basis that decedent's Will must first be construed under principles of Michigan law to ascertain the scope of the trustees' authority, and under a proper construction, "ascertainable standards" did exist under the Treasury Regulation and applicable Federal case law.

C. The District Court construed decedent's Will to the effect that the trustees could give income (over that needed for the daughter's support) to noncharitable institutions and that the trustees could terminate the trust before the daughter's death without restriction. The provisions of Article VI were wholly ignored by the Court in its opinion. Accordingly, the District Court granted the respondent's motion, upholding the determination of the Internal Revenue Service (Appendix, p. 19).

D. On appeal to the United States Court of Appeals for the Sixth Circuit, petitioner argued that the ambiguities of decedent's Will could not be resolved on the basis of the Will alone, and that the power of the trustees to terminate the trust was immaterial to the issue, since the remainder went to charity in any event under Article VI of the Will.

The Court of Appeals construed decedent's Will to provide that excess income could go to noncharitable institutions and that the trustees could, without the restriction of an ascertainable standard, terminate the trust before the daughter's death and distribute the remainder to the daughter or to noncharitable institutions (Appendix, p 29). Again, the provisions of Article VI regarding distribution on termination were completely disregarded as if nonexistent. The determination of the District Court in granting the respondent's motion for summary judgment prior to a trial on the merits was therefore affirmed.

REASONS FOR GRANTING THE WRIT

1. IN CONSTRUING DECEDENT'S WILL, THE DECISIONS OF THE COURT OF APPEALS AND DISTRICT COURT CONFLICT WITH MICHIGAN SUPREME COURT DECISIONS.

Both the Court of Appeals and the Distict Court found that decedent's Will did not establish "ascertainable standards" governing the trustees' exercise of discretion in using income and principal for noncharitable purposes. Given the construction of the Will that both Courts arrive at, their conclusion on the tax law is correct. However, both Courts in construing the Will contravene and contradict established and uniform rules laid down in Michigan Supreme Court decisions.

Clearly, under 28 U.S.C. Section 1652 the Federal courts in a Will construction matter must follow the law of the state of domicile. See *Lyeth* v. *Hoey,* 305 U.S. 188 (1938); *DeVaughan* v. *Hutchinson,* 165 U.S. 566 (1897); *Roberts* v. *Lewis,* 153 U.S. 367 (1894). In its opinion, the Court of Appeals apparently acknowledges this principle (Appendix, p. 30).

In the course of this litigation, petitioner pointed to several ambiguities in the Will, requiring judicial construction:

(1) The Trustees are granted discretion in paragraph (a) of Article V to distribute "surplus" income to such institution where the decedent's daughter then resides "or to such other charitable or religious institutions." Does the word "other" limit the distribution only to charitable institutions?

(2) In paragraph (b) of Article V the decedent states that her "motive" in establishing the trust is "to guarantee the use and disposal of my trust estate at all times for the best interest of the beneficiary." Is this an added direction, expanding the previous directions to distribute principal to maintain the beneficiary's standard of living? Does the provision also apply to distribution of income?

(3) In Article VI, the trustees are directed to distribute to charity "upon termination" of the trust. Does this direction apply if the trustees exercise their power to terminate the trust before the daughter's death, such earlier distribution being "justified and warranted by the circumstances existing at the time"?

The Court of Appeals dealt specifically with each of the above questions, but in so doing, contravened and contradicted Michigan Supreme Court decisions on the same points.

(1) As to the ambiguity surrounding disposition of "surplus" income, the Court of Appeals states it considers the Will as a whole to determine decedent's intent (Appendix, p. 30). But in upholding a motion for summary judgment, the Court does not (nor can it) consider extrinsic evidence as bearing on intent, since there has been

no trial on the merits where the parties are given the opportunity to present evidence. This decision is contrary to Michigan Supreme Court decisions such as *In re Ecclestone's Estate,* 339 Mich. 15 (1954), 62 NW2d 606; *In re Ford's Estate,* 331 Mich. 220 (1951), 49 NW2d 154; *Sater* v. *Sater,* 329 Mich. 709 (1951), 46 NW2d 433; *Mills* v. *Butler,* 364 Mich. 422 (1961), 110 NW2d 817; and the Court of Appeals' own decision in *Buhl* v. *Kavanagh,* 118 F.2d 315 (CA-6, 1941). In the *Ecclestone* case the Michigan Supreme Court said:

> "A reading of the will leads one to the conclusion that it is ambiguous and, therefore, extrinsic evidence is admissible and proper to show what the term 'heirs' meant in paragraph 5 of the will and to show the intent of the testator. . . . " (p. 29)

and in *Ford,* it observed:

> "In the interpretation of a will, effect must be given to the intent of the testator as gathered from the entire instrument and viewed in the light of the conditions existing at the time the will was made . . .
>
> "A reading of paragraphs 15 and 16 of the will immediately challenges one's attention to the question of when testator intended the trust provisions were to become effective, consequently, the court was within its rights in receiving evidence to determine this fact. . . . " (p. 228) (citations omitted.)

The Court of Appeals and the District Court barred petitioner from introducing evidence of intent extrinsic to the instrument, which it would be permitted to do in a Michi-

gan court under Michigan law. As stated by the Sixth Circuit Court of Appeals in *Buhl:*

> "In view of the equivocal character of the language of the trust instrument, it is proper for the court to receive parol evidence as to the facts and circumstances surrounding the parties in the creation of the trust and to take into consideration their conduct in dealing with the res, *not for the purpose of varying the terms of the instrument but to show the circumstances attending its execution and the position of the settlor at the time to ascertain the sense in which the language in the contract was used. . . .*" (p. 321) (Emphasis added.)

(2) With respect to the final clause of Article V(b), the Court of Appeals finds that this language controls all other provisions (whether contradictory or not), saying: "However, we believe the testatrix's overriding concern . . . was to guarantee that the trust income and principal would be used for the 'best interest' of her daughter" (Appendix, p. 30). But the Court ignores that this was an expression of "motive" rather than a "direction" to her trustees. As so interpreted by the Court, the language is not consistent with the specific directions stated earlier to distribute income for the daughter's "support, maintenance and welfare" and principal, if necessary, to afford her "with the necessaries of life". Again, the Court has created an ambiguity which, under Michigan law, permits the introduction of extrinsic evidence to determine which alternative represents the decedent's true intent.

(3) The Court of Appeals construes Article V(b) to grant the trustees discretion to terminate the trust before the daughter's death and distribute principal and accumulated income either to her or to any institution where she

then resides. This construction of Article V(b) is repugnant to the express terms of Article VI which clearly state the trust is to go to charity upon termination, with no qualification as to the nature or type of termination. Consequently, the Court of Appeals has decided that ambiguous, equivocal language appearing earlier in a will controls clear language set forth later.

The applicable rule of will construction as stated by the Michigan Supreme Court is exactly contrary. In *Merrill* v. *Hubbard,* 348 Mich. 220 (1957), 82 NW2d 513, the Court said:

> "It has been stated many times that the primary rule of construction of a will is to reach and determine the intent of the testator, and in doing so all parts of the will must be considered. *It is also the rule that if there is repugnance in the will, the language in the former part of the will is to be read as modified by the latter part. . . .* " (p. 224) (Emphasis added.)

See also *Cary* v. *Toles,* 210 Mich. 30 (1920), 177 NW 279; 57 Am. Jur., Wills, §1128. The determination of the Court of Appeals in this case in effect rejects a well established Michigan rule of will construction, which other states follow as well.

Because the decision in the instant case conflicts with a clear and established body of Michigan law, it is important to testators, the courts, and the legal profession in Michigan to have the matter resolved. While this case involves Federal estate tax, it has great significance as a precedent in questions of will construction. Of course, the decision has great impact upon petitioner, depleting the trust by almost one-third through additional estate tax and interest.

2. IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT IN A CASE WHERE DECEDENT'S INTENT IS A DOMINANT FACTOR, THE DECISIONS OF THE COURT OF APPEALS AND DISTRICT COURT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Under Michigan rules of will construction, where ambiguities exist extrinsic evidence bearing on decedent's intent is proper and admissible. But petitioner was not permitted to introduce such evidence because the District Court granted respondent's motion for summary judgment on the basis there was no genuine issue of material fact.

This Court has held that in cases where "motive" or "intent" play leading roles, summary judgments are inappropriate. In *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464 (1962), this Court said:

> ". . . We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, . . . Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" (p. 473)

Again in *White Motor Co.* v. *United States,* 372 U.S. 253 (1963), this Court stated:

> "Summary judgments have a place in the antitrust field, as elsewhere, though, as we warned in *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464, 473, they are not appropriate 'where motive and intent play leading roles.' . . ." (p. 259)

That both parties requested summary judgment does not change the rule. *Associated Press* v. *United States,* 326 U.S. 1 (1945); *Walling* v. *Richmond Screw Anchor Co.,* 154 F.2d 780 (CA-2, 1946); *Begnaud* v. *White,* 170 F.2d 323 (CA-6, 1948).

This general principle has been applied by other Federal courts to cases where the instrument was ambiguous and hence there was a genuine factual issue as to its meaning. *Boro Hall Corp.* v. *General Motors Corp.*, 164 F.2d 770 (CA-2, 1947); *Rolle Mfg. Co.* v. *Marco Chemicals*, 92 F. Supp. 218 (D.C., N.J. 1950); *Six* v. *Mount Vernon Bridge Co.*, 8 FRD 578, 12 FR Serv. 56C.41, Case 1, (D.C., Mo. 1948).

As a result of the decisions of the District Court and Court of Appeals, the petitioner was denied its "day in court", namely, the opportunity to present evidence extrinsic to the document to establish decedent's intent. By not following the principles established by this Court with respect to summary judgments, a severe injustice has been worked on petitioner.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

MEMORANDUM AND ORDER

(U. S. District Court—Eastern District of Michigan—Southern Division)

Estate of Phyllis Ellerton McCord, Deceased, U. S. Bratton, Jr., Executor, Plaintiff,
v.
United States of America, Defendant.
} Civil No. 40249

In her last will and testament, decedent bequeathed the residue of her estate in trust for the use and benefit of her Mongoloid daughter. The trustees were to provide for the support, maintenance and welfare of the life beneficiary from income derived from the trust estate. The trustees were further empowered to invade the principal for such purposes, if necessary. They were granted sole discretion to distribute excess income to such institutions as the beneficiary may at that time reside to improve the conditions under which the beneficiary was living or to any other charitable institution. Upon the death of the beneficiary, the trust was to terminate and pursuant to Article VI, the trustees were directed to pay the principal and undistributed income to a Sect. 2055 institution (26 U.S.C. §2055).

The decedent's executor calculated the value of an ultimate bequest to a Sect. 2055 organization pursuant to the decedent's will and then sought a charitable deduction on decedent's federal estate tax return. The Internal Revenue Service disallowed the deduction. The plaintiff filed this

action to recover $490,404.52 in taxes and interest paid by decedent's estate. The parties filed cross motions for summary judgment and each asserts that law applicable to stipulated facts entitles it to judgment. The defendant's disallowance of the deduction is premised upon its position that the will is couched in language that permits distribution to organizations not qualified under §2055. The Revenue Service argues that this possibility is not so remote as to be negligible.

After creating the trust for the use and benefit of her daughter, the decedent's will provides in pertinent part:

ARTICLE V.

The trust herein created shall be for the life of my daughter, PHYLLIS ELLERTON McCORD II.

(a) It shall be the duty of my Trustees to pay such portion of the income derived from the trust estate to my said daughter, or to her Guardian, as shall in their sole judgment be necessary or expedient to properly and adequately provide for the support, maintenance and welfare of my said daughter. Said income shall be payable quarterly or at more frequent intervals, if the accumulation of income is sufficient to warrant it, or if, in the sole judgment and discretion of my Trusteees, more frequent distribution is required or justified by the needs of my beneficiary. If in any year said net income exceeds the amount necessary for the support and maintenance of my said daughter, then I direct that my Trustees, in their sole discretion, distribute such surplus income to such institution as my daughter may at that time reside, or to such other charitable or religious insti-

tutions as my Trustees in their sole judgment or discretion may determine. It is my primary objective or concern that my Trustees at all times make certain that such funds as are employed for the betterment of the condition under which my daughter is living, shall be directed especially toward improvements in the Unit or Village, so-called, in which my said daughter is at any such time living.

(b) I further direct that my Trustees herein nominated shall in their sole judgment and discretion have the right at any time during the operation of the trust, to invade the principal and distribute therefrom should they at any time conclude that the trust income, together with the separate income which the beneficiary may have, is insufficient to afford said beneficiary with the necessaries of life in keeping with the standard to which she is accustomed; and I do authorize my said Trustees to distribute the entire principal and income of said trust estate at any time prior to the time the trust would otherwise terminate in the manner hereinbefore set forth, if in their sole judgment and discretion, such earlier distribution is justified and warranted by the circumstances existing at the time of any such distribution of principal, it being my chief motive in establishing the within trust to attempt to guarantee the use and disposal of my trust estate at all times for the best interest of the beneficiary herein named.

(c) It is my desire, and I do so direct that my Trustees make arrangements to have some qualified individual pay visits, at least once every two weeks, to my daughter and spend sufficient time with her to take her out for a drive when weather permits, and to spend a reasonable visitation period with her, and

> my Trustees are authorized to expend the necessary sums to accomplish such visits by a qualified person.

A charitable remainder qualifies for a deduction under §2055 if the charitable income and remainder interest are "presently ascertainable and hence severable from non-charitable interest" (Trea. Reg. §20.2055-2(a)). In the event the trust instrument empowers the trustees to divert the bequest to private interests ". . . the deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of the power." (Trea. Reg. §20.2055-2(b).) To qualify, therefore, the bequest must be ascertainable with little or no likelihood that the bequest can be diverted to private interests. *United States* v. *Commercial National Bank of Kansas City,* 404 F.2d 927 (10th Cir. 1968), *cert. denied,* 393 U.S. 1000 (1968); *Salisbury* v. *United States,* 377 F.2d 700 (2nd Cir. 1967). A charitable bequest is ascertainable when, and only when, the trustees' discretion in dispersing funds is circumscribed by a clearly defined standard contained in the trust instrument. *Merchants Bank* v. *Commissioner,* 320 U.S. 256 (1943); *Henslee* v. *Union Planters Bank,* 335 U.S. 595 (1949). Article V. authorizes the trustees to "distribute such surplus income to such institutions as my daughter may at that time reside." This authorization is not circumscribed by a standard designed to guide the trustees' actions and, therefore, the value of the ultimate bequest is rendered uncertain and unpredictable. *Merchants Bank* v. *Commissioner, supra.*

The plaintiff argues that the testatrix intended that her daughter reside only in charitable institutions and, therefore, income transferred to an institution where the daughter resides qualifies the charitable bequest. Specifically, plaintiff argues that the phrase following the authorization recited above is qualified by the phrase "or

to such other charitable or religious institutions as my trustees in their sole judgment or discretion may determine." But, when construing the trust instrument as a whole, it is clear that the testator's sole concern was to provide for the "best interest of the beneficiary." It would be entirely consistent with this expressed purpose for the trustees to place the beneficiary in a home or institution that provided her with the best care, be it private or charitable. The trust instrument does not restrict the trustee to a certain type of institution. If the decedent intended to restrict the type of institutions available as a residence for her daughter, that limitation could have been forthrightly expressed. Without such clear expression, plaintiff's interpretation is contrary to the thrust of the entire will. Of necessity, the testatrix well knew that the institution itself would be responsible for the care and well-being of her daughter and this was her primary concern and stated purpose for the entire trust. We are persuaded that the trustees could distribute any part of the excess income to a non-charitable residence of the beneficiary to improve her living conditions and be entirely consistent with the testatrix's intent. This possible distribution of income is not limited by definite standards and, therefore, the resulting gift of income to charity is unascertainable.

Article V, paragraph (b) reinforces the clear intent expressed throughout the entire instrument. It provides that the trustees are empowered to terminate the trust "If in their sole judgment and discretion, such earlier distribution is justified and warranted by the circumstances existing at the time of any such distribution of principal, it being my chief motive in establishing the within trust to attempt to guarantee the use and disposal of my trust es-

tate at all times for the best interest of the beneficiary. . . . " Thus, the testatrix authorizes early termination of the estate when the trustees in their sole discretion determine that such action is necessary for the beneficiary's well-being. The "circumstances" necessary to precipitate early termination of the trust are neither enumerated nor explained. Rather, the decedent entrusts this to the sole judgment of the trustees and intended that they be guided by the "best interest" of the beneficiary. As in paragraph (a), no standard is set forth to guide the trustee in exercising this power. Therefore, the resultant gift of principal to charity is incapable of reasonable prediction and therefore does not qualify for deduction under §2055.

The plaintiff argues that the provisions of the Michigan Charitable Trustees Powers Act would control the distributions made under this trust and thus the bequest is deductible. In support of this argument, the plaintiff has presented the court with an affidavit of an Assistant Attorney General who states that he would enforce the act against the trustees of this estate. However, we may not look to the Michigan act to determine whether the trust qualifies for a federal tax exemption in the first instance. The act applies to trusts that are first deemed non-taxable, and forbids the trustees from jeopardizing exemptions "otherwise available." [MCLA 14.275.] The act does not attempt to define a tax-exempt trust or supply a definable standard where one does not exist. Here, the intention of the testatrix is controlling. She executed an instrument devoid of ascertainable standards. She did so to allow her trustees to distribute income and principal to private or charitable beneficiaries "to guarantee at all times the best interest of [her daughter]." Therefore, this charitable bequest is incapable of reasonable valuation. The Michi-

gan statute relied upon by the plaintiff cannot cure this deficiency.

Accordingly, IT IS ORDERED that the defendant's Motion for Summary Judgment be and hereby is granted.

/s/ Robert E. DeMascio
United States District Judge

Dated: October 22, 1974.

APPENDIX B

OPINION

(United States Court of Appeals for the Sixth Circuit)

No. 75-1042

Estate of Phyllis Ellerton McCord, Deceased, U.S. Bratton, Jr., Executor,
Plaintiff-Appellant,
v.
United States of America,
Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed May 30, 1975.

Before: Weick and McCree, Circuit Judges, and Cecil, Senior Circuit Judge.

McCree, Circuit Judge. This is an appeal from the grant of summary judgment in favor of the government in an action for the refund of federal estate taxes. The parties stipulated the facts and the only issues before us are questions of law.

The decedent died November 12, 1968, leaving a gross estate amounting to $1,679,269.61. She was survived by the only child born to her, a daughter suffering from Down's Syndrome (Mongolism). The child had resided in a state institution in Lapeer, Michigan, for twelve years

before the death of her mother. After making a number of specific bequests, the decedent established a testamentary trust of the residue of her estate to provide for the support and care of the daughter during her lifetime, and, at her death, for the distribution of the remainder to designated charities qualifying under Section 2055 of the Internal Revenue Code of 1954 (26 U.S.C. § 2055). The trust agreement permits the trustees to invade the trust corpus, if necessary, to provide for the daughter in a manner consistent with her accustomed standard of living. It also permits the payment of any surplus income beyond that required for the daughter's support to the institution wherein the daughter might reside, or to other charities. Another provision authorized the trustees to terminate the trust before the death of the daughter if it should be in her best interest.

The provisions relating to the distribution of surplus income and termination of the trust are found in Article V of the will. They provide:

> (a) It shall be the duty of my Trustees to pay such portion of the income derived from the trust estate to my said daughter, or to her Guardian, as shall in their sole judgment be necessary or expedient to properly and adequately provide for the support, maintenance and welfare of my said daughter. Said income shall be payable quarterly or at more frequent intervals, if the accumulation of income is sufficient to warrant it, or if, in the sole judgment and discretion of my Trustees, more frequent distribution is required or justified by the needs of my beneficiary. If in any year said net income exceeds the amount necessary for the support and maintenance of my said daughter, then I direct that my Trustees, in their sole discretion, distribute such surplus income to such institution as

my daughter may at that time reside, or to such other charitable or religious institutions as my Trustees in their sole judgment or discretion may detemine. It is my primary objective or concern that my Trustees at all times make certain that such funds as are employed for the betterment of the condition under which my daughter is living, shall be directed especially toward improvements in the Unit or Village, so-called, in which my said daughter is at any such time living.

(b) I further direct that my Trustees herein nominated shall in their sole judgment and discretion have the right at any time during the operation of the trust, to invade the principal and distribute therefrom should they at any time conclude that the trust income, together with the separate income which the beneficiary may have, is insufficient to afford said beneficiary with the necessaries of life in keeping with the standard to which she is accustomed; and I do authorize my said Trustee to distribute the entire principal and income of said trust estate at any time prior to the time the trust would otherwise terminate in the manner hereinbefore set forth, if in their sole judgment and discretion, such earlier distribution is justified and warranted by the circumstances existing at the time of any such distribution of principal, it being my chief motive in establishing the within trust to attempt to guarantee the use and disposal of my trust estate at all times for the best interest of the beneficiary herein named.

The district court determined that the Internal Revenue Service correctly disallowed the entire $490,404.52 charitable deduction claimed by the estate because the will permitted the trustees to distribute surplus income to a residence of the daughter that might not be a charity and

also authorized the trustees to terminate the trust without regard to an ascertainable standard and distribute the principal in the "best interest" of the daughter.

The two issues[1] presented in this appeal are (1) whether the provision allowing for the early termination of the trust is governed by an ascertainable standard that assures that the amount to be bequeathed to the charities can be reliably predicted, and (2) whether the will permits the trustees to pay excess income to non-charitable institutions in unascertainable amounts.

Section 2055 of the Internal Revenue Code of 1954[2] provides that an estate may deduct the value of charitable bequests made by it. Treasury Regulation § 20.2055-2 provides that: "If a trust is created or property is transferred for both a charitable and a private purpose, deduction may be taken of the value of the charitable beneficial interest only insofar as that interest is presently ascertainable, and hence severable from the noncharitable interest. . . . Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay the principal to a charitable organization, the present value of the remainder is deductible."

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[1] The parties agree that the case must be remanded to the district court for computation and refund of the tax liability because of the disallowance of claimed deductions for attorneys' and executors' fees. See *First Natioanl Bank of Oregon* v. *United States*, 488 F.2d 575, 578 (9th Cir. 1973).

[2] Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2055. TRANSFERS FOR PUBLIC, CHARITABLE, AND RELIGIOUS USES.

(a) *In General.*—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers (including the interest

(*continued on next page*)

The Supreme Court has decided three cases concerning ascertainable standards as they relate to charitable remainders. In *Ithaca Trust Co., Executor* v. *United States,* 279 U.S. 151 (1929), the testator bequeathed the residue of his estate in trust to pay the income to his wife for life. The trustee was granted the authority to invade corpus for any sum "that may be necessary to suitably maintain her in as much comfort as she now enjoys." 279 U.S. at 154. The Court held that the value of the charitable remainder was deductible because "[t]he standard was fixed in fact and capable of being stated in definite terms of money." *Id.*

(Continued from preceding page)

> which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made before the date prescribed for the filing of the estate tax return)—
>
> (1) to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes;
>
> (2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;
>
> (3) to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and no substantial part of the activities of such trustee or trustees, or of such fraternal society, order, or association, is carrying on propaganda, or otherwise attempting, to influence legislation. . . .
>
> * * * * *

In *Merchants National Bank* v. *Commissioner*, 320 U.S. 256 (1943), the testator provided a testamentary trust from which the income was to be paid to the testator's widow for life, and on her death all but a specified amount of the principal was to be distributed to designated charities. The trustee was authorized to invade the corpus for the "comfort, support, maintenance, and/or happiness" of the widow and was directed to exercise that discretion with liberality towards the widow and to consider her "welfare, comfort and happiness prior to claims of residuary beneficiaries."

The Supreme Court distinguished *Ithaca* on the basis that under the will's terms the "extent to which the principal might be used was not restricted by a fixed standard based on the widow's prior way of life." 320 U.S. at 261. The Court emphasized that "the purposes for which the widow could, and might wish to have the fund spent do not lend themselves to reliable prediction." *Id.* at 262.

In the third Supreme Court decision, *Henslee* v. *Union Planters National Bank & Trust Co.*, 335 U.S. 595 (1948), the testator left his entire estate in trust for his 85 year old mother during her lifetime, after which certain specific bequests were to be made and the residue of the estate was to be divided equally among four named charities. The trustees were directed to pay $750 per month from the income of the trust and the testator also provided that: "In addition to this amount, my said executors and trustees are authorized and empowered to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother." 335 U.S. at 596. The trustees were further admonished that the "first objective to be accomplished" was to provide for her "in such manner as she may desire." *Id.* She died three years later without invading the corpus of the trust.

The Court held for the government emphasizing the subjective criteria upon which the power to invade was based and the resulting difficulty of predicting the amount by which the remainder might be diminished.

We consider first whether the provision authorizing the trustees to terminate the trust before its termination at the daughter's death is governed by an ascertainable standard. The pertinent language of the will permits the trustees to terminate the trust "if in their sole judgment and discretion, such earlier distribution is justified and warranted by the circumstances existing at the time of any such distribution of principal, it being my chief motive in establishing the within trust to attempt to guarantee the use and disposal of my trust estate at all times for the best interest of the beneficiary. . . . "

Although there may be legal differences between the power to terminate a trust and discretionary authority to invade its corpus for the benefit of a life beneficiary, we believe the invasion of corpus cases are sufficiently analogous to provide us with helpful insights about ascertainable standards. We agree with the district court's observation that: "The 'circumstances' necessary to precipitate early termination of the trust are neither enumerated or explained." Accordingly, this case does not fall within the *Ithaca Trust* line of cases where to maintain the accustomed standard of living of the beneficiary was the sole authorization for invading the corpus. Instead, we consider a case where there is no reviewable standard governing the termination of the trust. The trustees here have an even broader discretion than was the case in *Union Planters Bank, supra,* where the charitable deduction was denied although the Court observed: "there may have been little chance of that extravagance which would waste a

part or consume the whole of the charitable interest, that chance remained. What common experience might regard as remote in the generality of cases may nonetheless be beyond the realm of precise prediction in the single instance." 335 U.S. at 599. *See also Gammons* v. *Hassett,* 121 F.2d 229 (1st Cir.), *cert. denied,* 314 U.S. 673 (1941); *State Street Bank & Trust Co.* v. *United States,* 313 F.2d 29 (1st Cir. 1963); *Vaccaro* v. *United States,* 224 F. Supp. 307 (D.C. Mass. 1964).

Appellant contends that the district court incorrectly assumed that if the trust should be terminated before the beneficiary's death, the trust assets could be distributed to noncharitable organizations. We agree with the district court that the language in the termination provision would allow the trustees to give the trust assets to the daughter or to a noncharitable institution if they believed it was in the best interest of the daughter. If the daughter lived at a noncharitable institution and the trustees determined "in their sole judgment and discretion" that the "circumstances" warranted it, they could terminate the trust and make a gift of the principal to the institution.

The second issue presented is whether the agreement permits the trustees to spend excess income on improvements for a noncharitable institution where the daughter might reside. The trustees have the authority under the will to determine where the daughter resides. In fact, in 1970 the daughter was moved from the Lapeer State Home and Training School to the Coleman Foundation, a charitable residential care facility located in Hudsonville Michigan. It is within the trustees' authority and discretion to place her in a noncharitable institution as well as in a charitable one.

Appellant contends, however, that the phrase in the will authorizing the trustees to "distribute such surplus income

to such institutions as my daughter may at that time reside, or to *such other* charitable or religious institutions as my trustees in their sole judgment may determine," permits the trustees to pay excess income only to a charitable or religious institution. (Emphasis added). Appellant urges us to consider the will as a whole in order to determine the testatrix's intent. *In re Lawton Estate,* 347 Mich. 143, 79 N.W.2d 463 (1956); *In re Charlton Estate,* 9 Mich. App. 625, 157 N.W.2d 821 (1968). We believe the terms of the trust agreement read together indicate that the testatrix intended to authorize the trustees to pay the excess income of the trust to any institution in which her daughter might live, regardless whether it was private or state-supported, charitable or noncharitable. Under Michigan law, a testator's dominant charitable purpose will not be defeated by technical construction of the terms of the trust. *Love* v. *Sullivan,* 5 Mich App. 201, 146 N.W.2d 117 (1966). However, we believe the testatrix's overriding concern, as expressed in the last sentence of Article V(b) was to guarantee that the trust income and principal would be used for the "best interest" of her daughter. As the Third Circuit said in *Zentmayer's Estate* v. *Commissioner,* 336 F.2d 488, 490 (1964): "the question is not . . . what the trustees were likely to do but what they had the power to do." We believe the trustees had the power to use the excess income to improve a noncharitable institution if the daughter should reside there.

The district court's judgment concerning the early termination and excess income provisions is affirmed and the cause is remanded for the entry of judgment refuding that portion of the tax based on the deduction claimed for attorneys' and executors' fees.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-426

U. S. BRATTON, JR., EXECUTOR, ESTATE OF PHYLLIS ELLERTON MCCORD, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole question presented by the petition in this federal estate tax case is whether petitioner, an executor of an estate, was entitled to introduce evidence extrinsic to the decedent's will in support of his claim on behalf of the estate for a charitable deduction under Section 2055 of the Internal Revenue Code of 1954. The decision below held that the decedent's intent was clearly shown by the will, so that no extrinsic evidence was admissible.

The pertinent facts are as follows: The decedent, Phyllis Ellerton McCord, died in 1968. She was sur-

vived by her daughter who has been afflicted since birth with severe mental retardation, and who resided in an institution at the time of her mother's death. The daughter will be institutionalized for life (Pet. App. A 15; Pet. App. B 22–23; Pet. 3).

In her will, the decedent established a testamentary trust for the residue of her estate. The will provided for the trust income to be expended for the support, maintenance and welfare of the daughter, and, upon the daughter's death, for distribution of the remaining principal and income to designated charities. The trustees were authorized to invade principal if the trust income proved to be inadequate to provide the daughter with the necessaries of life in keeping with her accustomed standard (Pet. App. B 23–24).

The will gave the trustees, in their sole discretion, the power to distribute income in excess of the amount necessary for the support and maintenance of the daughter to the institution in which decedent's daughter may reside. The will stated that it was the primary objective of the decedent that the trustees made certain that whatever funds are employed for the betterment of the condition under which the daughter was living, be directed especially toward improvements in the particular area of the institution in which the daughter was living. The will also gave the trustees power to distribute the entire trust income and principal if they concluded that it was in the best interest of the daughter. Finally, the will provided that upon the termination of the trust or in the event the daughter predeceases the decedent, the principal and accu-

mulated income shall be distributed to the trustees of the Episcopal Diocese of Michigan for the purposes of establishing and maintaining a home for retarded children and adults (Pet. App. B 23–24; Pet. 5).

The estate claimed a charitable deduction for the alleged value of the charitable interests. On audit, the Commissioner disallowed the deduction. In this refund suit, the district court entered summary judgment for the government (Pet. App. A 21), and the court of appeals affirmed (Pet. App. B 22–30).

It is well settled by the decisions of this Court that when a testamentary trust provides benefits for a private beneficiary as well as for charity, a charitable estate tax deduction is available only to the extent that the value of the charitable interests, as of the time of death of the decedent, is "presently ascertainable, and hence severable from the non-charitable interest." Treasury Regulations, Section 20.2055–2(a). In order to preserve a charitable deduction, the trustee's power to invade must be governed by an ascertainable standard contained in the trust instrument, *i.e.*, a standard "fixed in fact and capable of being stated in definite terms of money." *Ithaca Trust Co.* v. *United States*, 279 U.S. 151, 154. Accord: *Merchants Bank* v. *Commissioner*, 320 U.S. 256; *Henslee* v. *Union Planters Bank*, 335 U.S. 595.

Here, the decedent's will unquestionably authorized the trustees to distribute surplus trust income to a noncharitable institution where the daughter might reside, and also to terminate the trust and distribute trust income and principal at any time if in their judgment such action would be in the best interest of

the daughter. As a result, the courts below correctly held that the will did not limit these powers by any ascertainable standards.

Petitioner concedes (Pet. 7) that, assuming *arguendo* the correctness of the construction given to the will by the courts below, the substantive decision in this case is correct. He argues (Pet. 7–11, 12–13), however, that Michigan law compelled the district court to hear evidence extrinsic to the will, and that summary judgment was therefore improper. But under Michigan law, as elsewhere, the applicable principle in the interpretation of wills is that all parts of the will must be considered in order to ascertain the intention of the testator. See *In re Lawton Estate*, 347 Mich. 143, 145, 79 N.W. 2d 463, 464.

After examining the decedent's will, the court of appeals concluded that her overriding concern, as expressed in her will, was "to guarantee that the trust income and principal would be used for the 'best interest' of her daughter" (Pet. pp. B 30). Since the terms of the will were not ambiguous, no extrinsic evidence could be considered under Michigan law. Petitioner's contention under the applicable state law does not warrant review by this Court.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

U. S. GOVERNMENT PRINTING OFFICE: 1975